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No. 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WOODWARD SAND COMPANY, INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America; JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,

Appellees.

On Appeal From A Three Judge Court Of The United States District Court For The Central District Of California

BRIEF IN OPPOSITION TO APPELLEE PENSION BENEFIT GUARANTY CORPORATION'S MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE COURT HAS NOT PREVIOUSLY CONSIDERED THE SUBSTANTIAL CONSTITUTIONAL QUESTIONS RAISED BY THIS APPEAL	2
PAST REGULATION IN THE AREA OF PENSION LAW DOES NOT JUSTIFY THE TAKINGS HERE IN QUESTION	4
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) 3

Baker v. Carr, 369 U.S. 189 (1962) 2

Brown v. Allen, 344 U.S. 443 (1953) 3

National Railroad Passenger Corp. v. A.T. & S.F. Railway, 53 U.S.L.W. 4285 (March 18, 1985) 3

PBGC v. R.A. Gray & Co., __ U.S. __, 104 S.Ct. 2709 (1984) 2,3

United States v. Locke, 53 U.S.L.W. 4433 (April 1, 1985) 5

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 3

CONSTITUTIONAL PROVISION

United States Constitution, Fifth Amendment ..... passim

RULE

Rules of Court, Rule 17.1 3

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BRIEF IN OPPOSITION TO APPELLEE PENSION BENEFIT GUARANTY CORPORATION'S MOTION TO AFFIRM

The question of whether the Taking Clause of the Fifth Amendment of the United States Constitution is violated by Congress' imposition of liability upon employers seeking to withdraw from participation in pension funds is substantial and worthy of plenary consideration, with full briefing and oral argument on the merits. The reasons for this are set forth in Woodward Sand's Jurisdictional Statement, and will not be repeated here. A brief response

to the Motion to Affirm submitted by Appellee Pension Benefit Guaranty Corporation ("PBGC") is, however, in order.[1]

THE COURT HAS NOT PREVIOUSLY CONSIDERED THE SUBSTANTIAL CONSTITUTIONAL QUESTIONS RAISED BY THIS APPEAL

PBGC mischaracterizes this action as "yet another challenge to the constitutionality of the Multiemployer [Pension Plan Amendments] Act's withdrawal liability provisions upheld in [*PBGC v. R.A. Gray & Co.*, __ U.S. __, 104 S.Ct. 2709 (1984)]." Motion to Affirm, p. 2. The more relevant discussion of the *Gray* opinion appears in the first footnote of PBGC's Motion, where it is conceded that in *Gray*, the facial constitutionality of MPPAA's withdrawal liability requirements was not in question, and was not addressed by the Court. In fact, for purposes of its decision in *Gray*, the Court explicitly "assume[d] . . . that the prospective effects of the Act satisfy constitutional standards." *Gray*, __ U.S. __, 104 S.Ct. at 2717 n. 7.

The question presented in *Gray*, stated in the opening sentence of the opinion, was "whether application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during a five-month period prior to the statute's enactment violates *the Due Process Clause of the Fifth Amendment*" (emphasis added). Such

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[1] PBGC suggests in Footnote 6 of its Motion that Woodward Sand may not have standing to participate in this case because its withdrawal may have been effective before September 26, 1980. Although Woodward Sand has asserted to the Pension Trust that it withdrew before September 26, 1980, the Pension Trust still maintains that the withdrawal occurred after that date, and that Woodward Sand is therefore liable under MPPAA. Woodward Sand therefore retains the requisite "personal stake in the outcome of the controversy [sufficient] to insure the concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 189 (1962).

an inquiry requires application of a standard which is entirely different from the one which pertains to the instant case. The relevant question in *Gray*, where the analysis was based upon a due process challenge, was whether the enactment in question, which authorized retroactive application of MPPAA, represented a rational exercise of Congress' power. A very different question must be answered here. However "rational" the basis for Congress' enactment of MPPAA may be, "that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982). Thus, PBGC's extended discussion of Congress' purpose in creating MPPAA, Motion to Affirm at 3-5, does not respond to Woodward Sand's contention that the consequence of MPPAA's withdrawal liability requirements is the unconstitutional uncompensated taking of private property from employers for purposes of transfer to private pension funds for their private use.[2]

Previous denials of certiorari in cases which included challenges to the constitutionality of MPPAA's withdrawal liability provisions should likewise not influence the Court's determination of whether the Taking Clause challenge raised in this appeal presents a substantial federal question. PGBC's suggestion to the contrary disregards the facts that certiorari jurisdiction is wholly discretionary, Supreme Court Rule 17.1, and that a denial of certiorari indicates no views on the merits, *Brown v. Allen*, 344 U.S. 443, 489-97 (1953). In contrast, cases brought within appeals jurisdiction must be decided on the merits, and thus, the summary affirmance sought by Appellee in this case would have precedential effect with regard to the "issues presented and necessarily decided by" such an action. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Determination of whether plenary consideration of issues raised by

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[2] PBGC's references to cases involving due process analyses are unpersuasive in the context of this Taking Clause challenge to MPPAA. As discussed above, *Gray* is one such case; *National Railroad Passenger Corp. v. A.T. & S.F. Railway*, 53 U.S.L.W. 4285 (March 18, 1985), is another. No Taking Clause issue was involved in either action.

an appeal is warranted necessarily raises different questions than those at issue when the Court reviews a petition for certiorari.

PAST REGULATION IN THE AREA OF PENSION LAW DOES NOT JUSTIFY THE TAKINGS HERE IN QUESTION

MPPAA's withdrawal liability provisions deprive employers of their property in the form of substantial sums of money, as well as contractually based rights and expectations, by creating a wholly new liability which was neither foreseen nor bargained for, and which is designed to remedy a deficit which exists due to pension benefit levels, investment decisions and other computations over which they exercised no control.[3]

PBGC's contention that no compensable taking has occurred because prior regulation "in the area of pension law" destroyed any "reasonable investment-backed expectation" of employers that their contractual arrangements with pension funds were valid and binding on both parties is without merit. Under PBGC's logic, no contractual arrangements may be relied upon by parties as protection against arbitrary governmental taking of additional private property for the benefit of other parties to the agreement in any area in which there is legislation. The withdrawal liability provisions enacted in 1980 are not simply an extension of earlier,

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[3] PBGC's assertion that MPPAA's withdrawal liability provisions simply require withdrawing employers "to *complete* funding *their shares* of the plan's unfunded liabilities", Motion to Affirm, p. 8 (emphasis added), incorrectly implies that MPPAA addresses some responsibility or obligation still owed to the pension funds by the employers in question. As noted above, this is not the case. The unfunded vested liabilities exist because the *pension funds* independently guaranteed benefit levels which exceed the amounts yielded by the *pension funds*' investment and allocation of employer contributions. The employers had no part in setting the benefit levels or investing the monies they contributed, and therefore have no "shares" of the unfunded liabilities whose funding they need to "complete".

legitimate "regulation," but rather represent an entirely new and impermissible intrusion into an area where employers' expectations were indisputably "investment-backed," and wholly reasonable.[4] It is abrogation, not regulation, of contractual expectations which is at issue here, and the effect of such abrogation is the unconstitutional taking of monies from private employers for transfer to private funds for their private use. Prior, valid regulation "in the area of pension law" does not justify such actions, or extinguish the reasonable, investment-backed expectations existing in *this* area of pension law.

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[4] PBGC devotes Footnote 7 of its Motion to a discussion of the Court's recent decision in *United States v. Locke*, 53 U.S.L.W. 4433 (April 1, 1985), a case which included constitutional challenges to the Federal Land Policy and Management Act of 1976 on due process and Taking Clause grounds. The Court concluded that there was no due process violation because Congress had a rational basis for enactment of the legislation, and that there was no unconstitutional taking because "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized *as long as he complies with reasonable regulatory restrictions* the legislature has imposed." (Emphasis added). This rationale quite obviously cannot be extended to the instant case; Woodward Sand is not seeking compensation "for the consequences of [its] own neglect," but rather is challenging the arbitrary assessment of a wholly new, unavoidable liability, imposed upon it by legislation for purposes of remedying a situation which occurred through no fault of its own, and which consists of the uncompensated taking of monies for transfer to another private party for its private use in contravention of Woodward Sand's contractual rights and expectations.

CONCLUSION

For the reasons stated above, and in Woodward Sand's Jurisdictional Statement, PBGC's Motion to Affirm should be denied, and the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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